Vanderbilt Law Review

Volume 12
Issue 4 *Issue 4 - October 1959*

Article 21

10-1959

Real Property--1959 Tennessee Survey

Thomas G. Roady, Jr.
Vanderbilt School of Law

REAL PROPERTY—1959 TENNESSEE SURVEY

THOMAS G. ROADY, JR.*

* * *

I. INTERESTS IN LAND

1. Future Interests.—The creation of divided interests in real property always carries with it problems in controlling the use and management by the owner of the possessory interest. One of the most difficult problems in future interests is how to adjust the relation between the holder of a present possessory interest and the holder of a future interest in the same parcel of land. In resolving such problems many courts are influenced primarily by the nature (classification) of the future interest involved and have worked out with some degree of certainty the distribution of benefits and burdens in the simple case "to B for life, remainder to C and his heirs" or the life estate, indefeasibly vested remainder situation. It becomes increasingly difficult and often impossible, however, to predict results where the division of ownership is more complex.

One of the earliest types of future interests recognized at the common law was the contingent remainder limited in favor of a person unborn. The fact that such a remainder can be limited in favor of unborn or unascertained persons in situations where there is a high degree of improbability that such interest will ever become possessory results in this type of remainder being subject, more commonly than other types of remainders,[1] (a) to judicially ordered sale for re-

* Professor of Law, Vanderbilt University; Faculty Advisor, *Vanderbilt Law Review;* member, Tennessee and Illinois Bars.

1. (1) Indefeasibly vested such as "to B for life, remainder to C and his heirs." (2) Vested subject to being partially divested such as "to B for life, remainder to the children of B and their heirs," and B has at the time of

investment[2] and (b) to being bound by an application of the doctrine of representation.[3] But the power of courts of equity to order the sale for reinvestment where this type of future interest exists is very narrow indeed. Because of this fact many states have statutes tending to extend the power.[4]

In *Rodgers v. Unborn Child or Children of Rogers*,[5] a testator had created a life estate in petitioner with a number of contingent remainders, one of them in favor of the child or children surviving said life tenant at her death. There was no controversy about the state of the title. The property being unproductive and in need of repairs, a petition was filed by the life tenant against the contingent remaindermen (none of whom were in being) for permission to (1) sell and reinvest or (2) mortgage and improve or (3) in the alternative to have title declared vested in the life tenant in fee. The chancellor overruled the demurrer of the guardian ad litem appointed for the unborn children. On appeal the supreme court reversed and dismissed the petition. Since there was a valid outstanding contingent remainder in the unborn children of the life tenant, it was obvious that petitioner was not entitled to relief by way of a decree vesting title in fee simple in her. Nor is there any theory on which such a result could be logically reached as long as the presumption that a woman is capable of bearing children regardless of age prevails and the destructibility of contingent remainders is not applicable.

It is unfortunate that relief by way of sale and reinvestment is not available on these facts especially in view of section 34-619 of the Tennessee Code Annotated. The policy underlying this statute permits a sale under court decree of the interests of persons not in being. Yet on the pleadings in this case such relief was not available since the statute has been interpreted so as to limit its application to those instances where there are persons already in being and before the court who have a common interest with those not in being or where

---

transfer one or more children with the possibility of further issue. (3) Vested subject to complete defeasance such as "to B for life, remainder as B shall appoint by deed or will, but in default of and until appointment to C and his heirs."

2. RESTATEMENT, PROPERTY § 153 (1936); 2 POWELL, REAL PROPERTY § 292 (1950).

3. Bransford Realty Co. v. Andrews, 128 Tenn. 725, 164 S.W. 1175 (1913); Ridley v. Halliday, 106 Tenn. 607, 61 S.W. 1025 (1901). And see cases collected 2 POWELL, REAL PROPERTY § 292 (1950).

4. TENN. CODE ANN. §§ 34-606, -610, -619, -620 (1956) are examples of legislative acts designed to broaden the jurisdiction of courts to deal with future interests and go much farther than legislation in other jurisdictions in that they cover any future interest.

5. 315 S.W.2d 521 (Tenn. 1958).

the proceeding is plenary and the doctrine of virtual representation is applicable.[6]

The extent of the holding in the instant case is that on the facts there was no proper pleading and no proper service of process and no proper case for the virtual representation of the unborn child or children by the life tenant petitioner to support the inherent jurisdiction of the equity court or the jurisdiction afforded by statute. It may well be that a life tenant situated as was the petitioner in this case can never obtain relief but this does not persuade one that contingent remainders created in unascertained persons should be abolished. It merely focuses the attention of the competent draftsman on the necessity for including in the will, deed or trust some authority for a life tenant of residential property to take the action desired here or, in short, to recognize that the distribution of benefits and burdens between life tenant and remaindermen should be spelled out in the instrument. The case may further point up the desirability for additional statutory authority to sell such interests under judicial supervision. It is difficult to make more of it.[7]

2. Easements.—Local governmental bodies often desire to abandon public easements in order to get out from under the expense attending the maintaining of them. The construction of new highways in particular has led to the abandonment of old routes which are not needed for travel by the general public after the new construction. There is little question about the legal right of a municipality to abandon. But the effect of an abandonment by a city or county of a public road cannot prejudice private rights of abutting landowners in such rights-of-way. The general rule is that owners of lots bordering upon public streets have a private easement of way in the street (a right of ingress and egress to and from their property via such way) in addition to their right to use it in general as a member of the public. It follows that interference with the use of this easement entitles the owner thereof to either legal or equitable relief.

During the survey period the western section of the court of appeals, in the case of *Paschall v. Valentine*,[8] affirmed an order of the chancery court of Henry County requiring the removal of obstructions defendant had placed across an abandoned public road. Complainant was an abutting landowner on the abandoned road but the court pointed out his private easement had not been affected by the

6. Jordan v. Jordan, 145 Tenn. 378, 239 S.W. 423 (1921); Bransford Realty Co. v. Andrews, *supra* note 3; Ridley v. Halliday, *supra* note 3.

7. For an additional discussion of the *Rodgers* case see Trautman, *Decedents' Estates, Trusts and Future Interests—1959 Tennessee Survey*, 12 VAND. L. REV. 1159 (1959).

8. 321 S.W.2d 568 (Tenn. App. W.S. 1958).

resolution of the Henry County Road Board relinquishing all public rights in the road. Other landowners adjacent to the abandoned right-of-way could not obstruct the road even though the Board had indicated in its resolution that they could do so.[9] The taking of such an interest of the complainant would require the use of eminent domain although the court indicates that in an appropriate case the public authority might permit the use of gates across a public right-of-way.[10] The decision by Judge Carney recognizes a long line of Tennessee authority.[11]

3. Restrictive Covenants.—The case of *Hysinger v. Mullinax*[12] raised the question of whether or not a party may maintain an action at law for damages based on violation of his rights under covenants restricting the use of another's premises after equitable relief by way of injunction has been denied him on the grounds that "existing circumstances" were such as to make enforcement of the covenants inequitable. The supreme court, in an opinion by Chief Justice Neil, reversed the circuit court of Bradley County which had sustained a demurrer to plaintiff's action at law for damages on the ground that the cause of action was equitable in nature and not enforceable in a court of law. The supreme court, without citing any prior Tennessee authority, held that a party so aggrieved is not confined solely to a court of equity but is entitled, after relief has been denied in such court, to have his action for breach of the covenant heard by a jury at law to determine his damage, if any.

There is, of course, a respectable body of American authority for the proposition that breach of a promise or covenant running with the land entitles the aggrieved person to recover at law a judgment for damages.[13] It is also clear that with the development of equity, it became possible to supplement the action at law for damages with equitable relief by way of injunction, specific performance, or the declaration of a lien to secure costs incurred by the promisee in performing the promised tasks. As might well be expected, it is the equitable relief which the promisee will ordinarily be seeking, for the nature of the promises are usually such that an action at law for damages will not accomplish the desired result which is to restrict the use made of

9. *Id.* at 569.
10. This is a highly questionable proposition and it is submitted that the statute cited, TENN. CODE ANN. § 54-923 (1956), could not be used where the right asserted by an abutting landowner was his private easement of ingress and egress as in the *Paschall* case. See Current v. Stevenson, 173 Tenn. 250, 116 S.W.2d 1026 (1938) and Melton v. Donnell, 173 Tenn. 19, 114 S.W.2d 49 (1938).
11. Current v. Stevenson, *supra* note 10; Anderson v. Turbeville, 46 Tenn. 150 (1867); Jackson v. Hutton, 15 Tenn. App. 281 (1932).
12. 319 S.W.2d 79 (Tenn. 1958).
13. See cases collected 5 POWELL, REAL PROPERTY § 671 n. 23 (1956).

the land burdened by the promise. The restrictive covenant has been used primarily to enable rapidly expanding suburban areas to retain their residential character, and equitable remedies are essential to the accomplishment of this objective.

Now, when a plaintiff is the beneficiary of a true covenant running with the land, it is obvious that a denial of equitable relief should not prejudice his right to an action at law for breach of such covenant. The action for damages antedates the equitable action and it is consistent with the notion that breach should be treated as the breach of an ordinary contract. But in many instances courts are not dealing with true covenants running with the land. Rather they are dealing with equitable servitudes, recognized originally in equity[14] and traditionally protected only in equity. One does not know from the brief statement of facts contained in the *Hysinger* case whether a true covenant[15] is involved or whether it is an equitable servitude.[16] The court in the opinion refers to the promise involved as a "restricted covenant."[17] But the demurrer to the declaration alleges specifically that privity of contract (or estate?) is lacking between plaintiff and defendant and further that the plaintiff's cause of action is of an equitable nature. Apparently, defendant's attorney thought an equitable servitude was involved and the circuit judge agreed with him. Without more facts we cannot be sure, but if the court was dealing with a servitude in this case it would seem fair to conclude that such interests are raised in this jurisdiction to legal interests in land—not just "equitable easements" but true easements.

The truly unfortunate aspect of this opinion, however, does not involve the result reached by the court but rather language used in the opinion which tends, in a left-handed way, to cut the ground out from under the landmark case of *Ridley v. Haiman*[18] and the much more recent case of *Hackett v. Steele*.[19] These earlier Tennessee cases were vigorous in their support of covenants and servitudes. The *Hackett* case in particular dealt directly with the question of whether or not a grantee whose property was burdened by a restrictive cove-

14. Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143 (1848).
15. The requirements for the covenant running with the land at law are: (1) a covenant or promise in writing sufficient to satisfy the Statute of Frauds; (2) an intention that the covenant or promise shall run with the land; (3) a covenant or promise of the type which touches and concerns the land; (4) privity of estate of either the mutual or successive variety.
16. The principal difference between the covenant and servitude is that equity does not regard items "(1)" and "(4)" in note 15 as essential to the enforceability of the promises. The equitable servitude is generally regarded today as an equitable property interest in the burdened land appurtenant to the benefited land and is often referred to as an "equitable easement."
17. 319 S.W.2d at 80.
18. 164 Tenn. 239, 47 S.W.2d 750 (1932).
19. 201 Tenn. 120, 297 S.W.2d 63 (1956).

nant could obtain relief from such covenant when there had been a drastic change in the character of the neighborhood. In that case the supreme court imposed a test that, if strictly adhered to, would make it virtually impossible for the owner of burdened land to avoid the performance of the promises.[20] Now, just two years later, the Supreme Court of Tennessee has gone out of its way[21] to state:

> The opinion of the Chancellor, which is included in the record, is the law of this case. The "existing circumstances" to which he referred and which support his decree show without dispute that "County Club Estates" had ceased to be desirable for residential purposes; that a number of lots upon which these restrictive covenants are imposed had been zoned commercial by the city of Cleveland, Tennessee. It thus conclusively appears that the Chancellor was eminently correct in holding that it would be inequitable to enforce these restrictive covenants . . . .

If all that is now needed to defeat the prayer for equitable relief is evidence that lots are not "desirable" for the restricted use and/or that a municipality has zoned the area for a less restrictive use, then the court has certainly abandoned the position taken in the former cases.

II. Titles and Deeds

Although the fundamental rule that in construing a deed the intent of the grantor or maker shall prevail has long been established, cases continue to arise wherein the courts have difficulty in determining such intent. In order to simplify the problem of resolving ambiguities and conflicting language, certain rules have been invoked in arriving at a grantor's intent. One of the old common law rules was phrased in terms of the granting clause prevailing over the habendum clause whenever the two were in irreconcilable conflict. Some authority supporting such a rule can be found in almost all jurisdictions.[22]

In the past this repuguancy rule has infringed upon and tended to nullify the general principle that in deriving a grantor's intent one must look at the language of the entire instrument. Even though there is little logic to support the repugnancy doctrine or the emphasis on a hierarchy of parts which gives special importance to the granting clause of a deed, they continue to plague the courts.[23] But the strong and desirable trend of authority is to avoid the older approach and to

20. For a discussion of this case see Roady, *Real Property—1957 Tennessee Survey*, 10 Vand. L. Rev. 1188, 1197 (1957).

21. Since the chancellor's decision was not in issue.

22. Teague v. Sowder, 121 Tenn. 132, 114 S.W. 484 (1908) presents the best analysis of the rule in Tennessee and contains extensive citations in support thereof.

23. 6 Powell, Real Property 244 (1958).

determine the intent of the grantor by all that has been written irrespective of the sequence or placement of the clauses.[24]

In *Grayson v. Holloway*[25] the chancellor in construing a deed involved in litigation had applied the old rule which gives effect to the granting clause when the habendum clause is regarded as being in irreconcilable conflict with it.[26] The supreme court sustained the assignment of error and in remanding directed the chancery court to give effect to all parts of the deed indicating that in so doing it would vest in G. P. Holloway and Mae Holloway an estate by the entireties.[27] This case is a strong one in support of the modern rule and should go far in eliminating completely any confusion that remains as to the approach to be used in this jurisdiction in construing deeds.[28]

III. EMINENT DOMAIN

With the increased recognition of the equitable servitude as a method of controlling land use has come the question of whether or not under the power of eminent domain the owners of the benefited land must be compensated if the taking of burdened land under such power permits the prohibited use. In *City of Shelbyville v. Kilpatrick*[29] this question was before the supreme court for the first time and after reviewing various conflicting authority from other jurisdictions the court, in an opinion by Justice Tomlinson, decided that the right of the owner of a dominant lot in a servient lot could not be taken by eminent domain without payment of compensation to him. It is submitted that this result is eminently fair and just and that it is consistent with the

24. In Southern Ry. Co. v. Griffitts, 304 S.W.2d 508 (Tenn. App. E.S. 1957), the court in construing the deed involved in litigation stated at page 510 that the grantor's intent should be "gathered from the language of the entire instrument and surrounding circumstances and in arriving at such intention from conflicting or repugnant clauses technical rules as to division of deeds into formal parts will not prevail against the manifest intent of the parties." An even better expression of the modern approach is found in the opinion of Judge Felts in Higginson v. Smith, 38 Tenn. App. 223, 226, 272 S.W.2d 348, 349 (1954).

25. 313 S.W.2d 555 (Tenn. 1958).

26. The granting clause conveyed to "G.P. Holloway." Consideration was stated in terms of the said G.P. Holloway caring for the grantors during their life and paying all funeral and burial expenses at their death. The habendum clause was "To have and to hold the same to the said G.P. Holloway and wife Mae Holloway and their heirs and assigns forever."

27. Support for this result was found not only in the habendum clause but in the clause stating the consideration, it being felt by the court that of necessity the wife was expected to render personal services to the grantors.

28. It might be argued that this case illustrates the strong preference existing in Tennessee for the estate by the entireties and that the case would have little significance when grantees would be other than husband and wife. This would be logical since one of the reasons given in support of the result is that as the wife of G.P. Holloway named in the granting clause, Mae Holloway would be expected to render part of the consideration.

29. 322 S.W.2d 203 (Tenn. 1959).

case of *Ridley v. Haiman*[30] wherein such restrictions were treated as creating interests in land.

On this question of the compensable nature of such interests, the cases in other jurisdictions are in hopeless and irreconcilable conflict. The split of authority is the result of courts analyzing the interest involved and coming to different conclusions as to its character. Those which view the right of the neighboring owner as a contractual one, enforceable only in equity, hold that compensation by the condemning authority is not required.[31] Those jurisdictions which have held that the owner must be compensated refer to the building restriction created by the deeds as "private property, an interest in real estate in the nature of an easement . . . a property right of value, which cannot be taken for the public use without due process of law and compensation therefor . . . ."[32] This latter view, which is adopted by the Tennessee Supreme Court, represents the numerical weight of authority and is the position adopted in the *Restatement of Property*.[33] Even though this position raises the very difficult problem of determining the value of the interest, it is clearly the correct one.[34]

During the survey period the supreme court also had occasion to construe section 6-1011 of the Tennessee Code Annotated which provides for an appeal by an aggrieved owner to the circuit court within twenty days after the administrative officer or officers have ordered the opening of a street through the ordinance method of condemnation. The defendant owner in *City of Knoxville v. Roach*[35] contended that the twenty day limitation period started to run when he received the notice from the administrative officer of the award and of his right to appeal. The court, however, affirmed the judgment of the court below holding that the controlling date is when the administrative officer makes the order, which meant that the owner had not perfected his appeal within the period provided. As the court pointed out, the statute means and includes not only the making of the order but also "the putting of that order into the channels of communication."[36]

30. *Supra* note 18.
31. See Friesen v. City of Glendale, 209 Cal. 524, 288 Pac. 1080 (1930). Additional authorities are cited in the City of Shelbyville opinion, *supra* note 29.
32. Allen v. City of Detroit, 167 Mich. 464, 133 N.W. 317 (1911). Numerous other cases in support of this position are cited in the opinion.
33. Section 566 (1944).
34. Since the interest taken is regarded as a property right appurtenant to the benefited land it would seem that it is the value of this right which should be measured. The *Restatement of Property* does not suggest how it should be arrived at but with respect to easements suggests that the amount can best be determined by valuing the land with and without the benefit attributing the difference to the right taken. For a discussion of the problem see Aigler, *Measure of Compensation for Extinguishment of Easement by Condemnation*, 1945 WIS. L. REV. 5
35. 319 S.W.2d 225 (Tenn. 1958).
36. *Id.* at 227.

In *Ragland v. Davidson County Board of Education*[37] the supreme court affirmed the holding of the Davidson County circuit court which had sustained a county court order authorizing the Board of Education to take a voluntary nonsuit in a condemnation proceeding after the appraisers' report had been filed and the Board had approved acquisition of the land at the appraisers' figure. The appeal of the property owner from the order of nonsuit was based on the theory that authority of the county judge over the proceeding expired at the adjournment of the term of court during which the award of the jury of view had been filed. The supreme court rejected this argument construing the code sections involved[38] as continuing the jurisdiction of the county court in a condemnation proceeding until there is a confirmation or setting aside of the award or until there is an appeal from it. In the instant case it appeared that the Board conducted percolation tests on the land after the report of the appraisers had been filed and the amount by resolution approved by them. These tests indicated that the land was unsuitable for the use intended and consequently the Board then requested a nonsuit.

The result reached in this case appears to extend somewhat the tendency to liberalize condemnation procedure for the benefit of the condemning authority. The court recognizes that it is moving away from the strict common law view favoring the property owner but apparently feels that this is in accord with the spirit of the legislation simplifying procedure and that no injustice can be done the property owner so long as he can recover such damages as the good faith action of the condemning authority in abandoning may have caused him.[39]

At a very early date it was established that the owner of landlocked property was entitled to a way of ingress and egress to and from such premises, the logical reason for such rule being that otherwise society might be deprived of the benefit of the economical use by all owners of their land. In most instances the question of whether or not a private individual could force a right-of-way over the land of another arose in situations where the doctrine of "implied easements" came into play and the terminology applied to such rights-of-way was "ways of necessity."[40] The reasonableness of allowing an owner to force a right-of-way over land of another when certain conditions exist is attested to by statutes in many jurisdictions, an example of which is found in the Tennessee Code Annotated, section 54-1902.

37. 312 S.W.2d 855 (Tenn. 1958).

38. TENN. CODE ANN. §§ 49-801 to -804 (1956).

39. See Stevens v. Duck River Nav. Co., 33 Tenn. 237 (1853).

40. Brown v. Berry, 46 Tenn. 98 (1868); Harris v. Gray, 28 Tenn. App. 231, 188 S.W.2d 933 (1945). Simonton, *Ways By Necessity*, 25 COLUM. L. REV. 571 (1925).

In *Vinson v. Nashville, Chattanooga & St. Louis Ry.*[41] the middle section of the court of appeals had before it a fact situation calling for an application of the above statute. In a well-reasoned opinion by Judge Felts, affirming a decree of Chancellor Lentz of Davidson County, it was held that a landowner who already had a twenty foot private way across defendant's premises could not avail himself of the statute to condemn a fifty foot right-of-way. This result was reached even though the twenty foot right-of-way was inadequate and the fifty foot way was necessary to plaintiff's plan to develop his land for residential housing. Judge Felts' construction of the statute is logical and is in keeping with the spirit of numerous opinions cited in his decision.

IV. Miscellaneous

1. *Boundary Disputes.*—Establishing a boundary line between two disputing landowners is ordinarily a question of fact. In a jurisdiction, such as Tennessee, where most land descriptions are by metes and bounds, this is a difficult problem for the tendency to use monuments whose locations shift or disappear is ever present and with the obliteration of the monuments the actual location of boundary lines becomes an almost hopeless task.

In order to resolve these conflicts the courts have adopted at least one rule which simplifies the settling of such disputes. This rule permits a party to such dispute to show that there had been an agreement as to the location of an unknown boundary line and, even though this is an oral agreement, the parties so establishing a boundary line will thereafter be estopped to question the line thus established even though it may afterward be demonstrated that such line was erroneously fixed.[42] In the case of *Webb v. Harris*,[43] this rule was invoked with approval although it appeared unnecessary to the decision.[44]

2. *Quiet Title.*—In *Montgomery v. Tapp*[45] the supreme court affirmed a decree of the chancery court of Shelby County wherein the chancellor had overruled a demurrer to complainant's suit to quiet title. When a complainant owner alleges that illegal restrictions have been placed on his land and that this will adversely affect his use

41. 321 S.W.2d 841 (Tenn. App. M.S. 1958).
42. Chadwell v. Chadwell, 93 Tenn. 201, 23 S.W. 973 (1893); Galbraith v. Lunsford, 87 Tenn. 88 (1888); Rogers v. Taylor & Co., 2 Tenn. App. 445 (1926).
43. 315 S.W.2d 274 (Tenn. App. W.S. 1958).
44. While the facts are not clear it appears that the court of appeals viewed the evidence as having established the adverse possession for over twenty years of the winning party below, thereby giving him the benefit of a presumption of lost grant.
45. 321 S.W.2d 565 (Tenn. 1959).

thereof he is entitled to pursue his remedy in equity even though there appears to be little or no foundation for the belief that the title is clouded or impaired.

V. LANDLORD AND TENANT

The duty to keep the premises repaired is usually spelled out in the lease, for absent any express covenant to repair the lessor has no obligation to the tenant to make them. There are, of course, some exceptions to this rule[46] but they are not of such nature that lessees can rely upon them with a sense of security. As a consequence, lessees who have the advantage of competent legal advice will insist upon express covenants covering the duty to repair and this is exactly what the tenant had done according to the facts in *Gilson v. Gillia*.[47] The landlord had expressly agreed to put the leased building in tenantable condition and, even though there was an exculpatory provision in one of the clauses, the court interpreted the entire lease as imposing on the landlord a duty to make certain repairs. In a suit by the tenant to recover damages caused by a leaking roof and for specific performance of the duty to repair, the chancellor, acting on the verdict of a jury, awarded damages to the tenant and ordered the landlord to perform the agreement to repair contained in the lease. The court of appeals affirmed the award of damages but reversed the decree of specific performance and remanded to the chancery court with instructions to allow the tenant to terminate the lease if he so desired.

The unusual aspect of the case, if any, is the refusal on the facts to sustain the chancellor's decree directing lessor to perform his covenant. In support of its holding in this regard the court of appeals points out the well recognized view that specific performance "being an equitable remedy, is the substitute for the legal remedy of compensation when the legal remedy is inadequate or impracticable, and, therefore, lies within the sound judicial discretion of the court upon a consideration of all the facts and circumstances surrounding the transaction."[48] But in this case, as the court itself recognized, damages did not constitute adequate compensation. Equitable relief, then, was in order. Yet the court denied the tenant specific performance, basing the denial on two grounds: (1) the difficulty the court would encounter in supervising or enforcing such a decree and (2) the "undue hardship" which enforcing the decree would work on the landlord. One wonders if the court was not carried away with its concern for

46. The rule does not apply where statutes impose a duty on lessors to make repairs nor does it apply where lessor retains control over portions of the premises. See LESAR, LANDLORD AND TENANT 346 (1957).

47. 321 S.W.2d 855 (Tenn. App. W.S. 1958).

48. *Id.* at 866.

the landlord's plight. If complainant is entitled to relief, the court should not shy away from a difficult job of enforcement and the fact that defendant used poor judgment in his undertaking should not deter the court from making him perform his promise. The case in the latter regard smacks of balancing the equities in a purely private dispute, something which is rarely done.

While not essential to the decision, the court discussed a breach by lessor of his covenant to repair as constituting a constructive eviction. Admitting that there has never been a clear-cut holding in this jurisdiction to the effect that breach of an express covenant to repair amounts to a constructive eviction, the court nevertheless indicated that the tenor of a prior Tennessee Supreme Court opinion approves this result.[49] It is unfortunate that the discussion of this point was undertaken at all since it tends to confuse the issues. While the court does not terminate the contract directly, the effect is to allow the defaulting lessor to effect a rescission through his failure to perform his promise. It is inconceivable that plaintiff-lessee will continue to use the premises suing periodically for damages even though the way, technically, is held open for him to do so.

VI. Legislation

Several Acts of the 1959 legislative session fell within the ambit of real property in that they affect conveyancing practice or pertain to the acquisition of and/or control of land use by municipalities. All such legislation will not be mentioned in this article, it being more appropriate to consider some of it elsewhere in the survey.

The legislature again amended section 62-1302 of the Tennessee Code Annotated.[50] As amended the statute makes it unlawful for any person, partnership, association or corporation to act as a real estate broker or real estate salesman, or to engage in such business directly or indirectly without first having obtained a license from the Tennessee Real Estate Commission in accordance with the provisions of chapter 62 of the code. This act is to have no application in counties with a population of less than 25,500 unless it is approved by a two-thirds vote of the quarterly county court of any county to which it may apply.

49. Boyd v. McCarty, 142 Tenn. 670, 222 S.W. 528 (1919). It should be noted that the *Boyd* case itself approved the rule refusing to imply a covenant by landlord to repair. In the absence of such a covenant there was no breach and therefore no action or inaction on the part of the landlord which could be used as a basis for holding that the tenant had been constructively evicted. There is considerable authority for the proposition that breach of an express covenant to repair or to furnish heat or services constitutes a constructive eviction. For a discussion and citations, see Lesar, Landlord and Tenant 281 (1957).

50. Tenn. Code Ann. § 62-1302 (Supp. 1959).

Section 67-5102 of the Tennessee Code Annotated was amended[51] to increase the bond of real estate agents or brokers from $1,000 to $5,000 in counties with a population of 50,000 or above; $2,500 in counties with a population of 20,000 or above and less than 50,000; and $1,000 in counties with a population of less than 20,000. The bond of real estate salesmen is left at $1,000 by the amendment.

The penalty section[52] of the Regional Planning Regulations was amended so as to make it applicable to an owner or agent of the owner of any land who "falsely represents to a prospective purchaser of real estate that roads or streets will be built or constructed by a county or other political subdivision."[53] This should further discourage unconscionable activity on the part of such persons and will tend to prevent the embarrassment and expense which such activity has caused county and other political bodies in the past.

Several acts were passed which reflected the increased interest in and use by governmental units of the power of eminent domain. Section 23-1405 of the eminent domain section of the code was amended[54] to require service of a copy of the petition filed on behalf of the person seeking to appropriate the land on the owner of the land or rights to be condemned along with the notice formerly required to be given at least five days in advance of the petition's presentation in court.

Authority to exercise the power of eminent domain was conferred by the legislature on all "existing senior colleges in Tennessee"[55] provided that such colleges have established campuses, grant bachelor's degrees and hold membership in the Southern Association of Colleges and Secondary Schools. The power is given to the same extent and is to be exercised in the same manner as the University of Tennessee under section 23-1506 of the Tennessee Code Annotated except that the property sought to be condemned must be adjacent to the campus of said senior college.

In order to eliminate the necessity of a deed from the owner of land condemned for school purposes under chapter 8 of title 49 of the Tennessee Code Annotated, section 804 was amended by the legislature to provide that "the decree of the Court vesting title in the board of education and their successors in office shall be a monument of title as in other eminent domain cases."[56] This amendment simplifies the title perfecting procedure and eliminates the rather

51. TENN. CODE ANN. § 67-5102 (Supp. 1959).
52. TENN. CODE ANN. § 13-310 (1956).
53. TENN. CODE ANN. § 13-310 (Supp. 1959).
54. TENN. CODE ANN. § 23-1405 (Supp. 1959).
55. TENN. CODE ANN. § 23-1506 (Supp. 1959).
56. TENN. CODE ANN. § 49-804 (Supp. 1959).

awkward method of requiring the owner to "make a deed in fee simple."

The most significant act adopted by the legislature affecting eminent domain procedure in the State of Tennessee is designed to provide a simple method for the state, its counties or municipalities to acquire "right-of-way, land, material, easements and rights as may be deemed necessary, suitable or desirable for the construction, reconstruction, maintenance, repair, drainage or protection of any street, road, highway, freeway or parkway by the official charged by law with the construction or maintenance of the same."[57] This statute will undoubtedly be the source of litigation for it is designed to minimize the cost of acquiring such interests and tends to place the burden of the eminent domain proceeding on the property owner. There are many things about the statute which the property owner will find unpalatable[58] and he can be expected to object strenuously. It will be interesting to see if this latest attempt to load the scale in favor of the governmental body in an eminent domain proceeding is successful.[59]

57. TENN. CODE ANN. §§ 23-1528 to -1541 (Supp. 1959).

58. The condemner, under the act, decides what property rights are needed, determines the amount to which the owner is entitled and deposits this amount with the clerk of the circuit or law court having jurisdiction in the county where the land is located. A petition is filed in this court asking for condemnation and naming all parties having interests as defendants. Before additional action is taken, five days notice is given said defendants. Five days after such notice is given the condemner is entitled to and may be summarily placed in possession. If the landowner is satisfied with the amount, he can accept it in full settlement and the court will decree title in the condemner. If not satisfied, the landowner must appear promptly and except to the amount so determined (the only issue or question to be tried is the amount of compensation), but he is not entitled to a trial until six months have expired after completion of the project provided that the matter must be tried if the project has not been completed within twenty-four months from the filing of the petition. There is some balm for the property owner in that he can, upon written request, obtain the sum deposited in court by the condemner without prejudice to his right to trial on the adequacy of the award but he must agree to refund the difference if the award is more than the judgment. The amount to which the owner is entitled is the fair cash market value plus incidental damage to residue after deducting from such incidental damage the value of special benefits to the residue occasioned by the construction. Costs are to be paid by condemner if the award on trial exceeds the amount assessed by the condemner but otherwise all costs incident to the trial must be paid by defendant.

59. The case of Maury County v. Porter, 195 Tenn. 116, 257 S.W.2d 16 (1953), would appear to raise serious doubts concerning the constitutionality of this act. See discussion Byrne, *Condemnation Trials—1959 Legislation*, 26 TENN. L. REV. 486 (1959).